No. 12,396

United States Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,
Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

March 20, 1950

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THE ISSUE.

The sole substantive question in this cause is: how long shall the compensation benefits for total disability of $25 per week last? We contend that where, as a result of two injuries occurring in separate employments, there are two employers liable for workmen's compensation, the weekly payments of $12.50

each continue during the period of total disability until the full liability of each employer has been exhausted.

REVIEW OF ARGUMENT.

We argued in our opening brief that the Longshoremen's Act contemplated the receipt of $25 per week by the totally disabled employee during the continuance of his total disability, and that this compensation ceases only when the liability of the employer has been exhausted by the limitations of Section 14(m) of the Act (prior to amendment in 1948). We argued that a proper interpretation of Section 14(m) related it to a limitation of liability of the employer, and not to any limitation of benefits receivable by an employee; that each injury may create an independent basis for liability for each employer so as to extend the duration of time during which the totally disabled employee is protected.

Just as, for example, particular words of inheritance in an estate may be held to be words of purchase and not words of limitation, so in this matter Section 14(m) must be held to relate to compensation *payable* by the employer, and not to compensation *receivable* by the employee.

APPELLEES' OBJECTIONS.

Appellees have submitted rebuttal material to our main arguments and have also raised the following general considerations:

(1) The deputy commissioner rejected the doctrine of apportionment.

(2) Injustices may arise because an employee with multiple employers may obtain greater compensation than an employee with a single employer.

(3) This court should resist all attempts by the government to sap and mine at the foundations of limited liability.

We will not rework our arguments in chief, but merely reply to these general considerations raised by appellees:

I.

IN FIXING PAYMENTS AT $12.50 PER WEEK FOR EACH EMPLOYER THE DEPUTY COMMISSIONER GAVE FULL RECOGNITION TO THE NEED FOR APPORTIONMENT.

We have no quarrel with the principle of apportionment, nor do we believe the deputy commissioner failed to apply the doctrine. In point of fact, in these cases by one order he awarded the sum of $12.50 per week to claimant for injury in the employment of appellee, Contractors, Pacific Naval Air Bases, and by a second order he awarded the sum of $12.50 per week to claimant for injury in the employ of appellee, Builders, Pearl Harbor Dry Dock No. 4. It is difficult

to see how the doctrine of apportionment could be adhered to more scrupulously. No claim has been made that claimant is entitled to $50 per week. The issue here is whether the $12.50 per week payment of, for example, appellee, Contractors, Pacific Naval Air Bases, should cease when Contractors, Pacific Naval Air Bases has paid out only $3,750. The only justification for such cessation in view of the continuing total disability of the claimant is that other sums were paid out by another employer. We maintain that the limitation of "compensation payable" set forth by Section 14(m) to the sum of $7,500 means what it says, and that until that sum has been paid out by an employer the section has no application to terminate benefits receivable by an employee for continuing total disability.

II.

HYPOTHETICAL DISCRIMINATION AGAINST PERSONS UNKNOWN IS NOT A PROPER SUBJECT FOR A COURT TO CONSIDER IN INTERPRETING A COMPENSATION STATUTE. THIS COURT CONSIDERS FACTS AND NOT HYPOTHESES.

Appellees vigorously argue that the continuance of compensation of $25 per week to Laird during the period of his total disability, until the liability of both of his employers has been used up, would be a discrimination against persons unknown who are apt to be the best and most worthy of employees. We readily concede that under no system of compensation is it possible to produce uniform and complete equal-

ity among all claimants, and under no system of law is it possible to eliminate all distinctions and inequalities. Appellees have suggested an example under which an employee with multiple employers would receive more compensation than an employee with a single employer. It is easy to cite other cases of inequality:

(1) A is self-employed. He is injured. No compensation.

(2) A is employed by an employer subject to employees' compensation. He is injured. A receives employees' compensation.

(3) A, during the course of his employment, is injured by the negligent driving of a vehicle owned by a third-party corporation. A receives workmen's compensation and $100,000 damages.

The rain falls on the just and the unjust, and it is no argument against a compensation system that it does not succeed in every respect in eliminating the element of chance from the hazards of life.

The sole question at issue here is whether an employer may terminate the duration of his liability prematurely because there has been more than one injury. It is difficult to see how there can be a valid claim of discrimination based on the fact that a totally disabled claimant may have the duration of his compensation extended for a longer period than might be the case under circumstances of single employment and single injury.

III.

IT IS IN THE NATURE OF STATUTORY INTERPRETATION THAT NOVEL QUESTIONS ARE CONTINUALLY ARISING WHOSE ANSWERS DEPEND ON LOGIC AND NOT ON PRECEDENT.

Appellees' final point is in the nature of *stare decisis,* or as they have expressed it in their brief, *obsta principiis.* As we understand the argument advanced by appellees, the court should resist change and be guided largely by precedent; otherwise, state appellees, continued sapping and mining at the foundations of Section 14(m) by the government would soon cause its complete collapse. (Brief for Appellees, 10-11.) We do not see the relevancy of this argument in view of the fact that the law was amended two years ago to specifically provide for indefinite employers' liability in cases of permanent total disability. But apart from this answer, we think it fundamental in law that a court cannot be guided by maxims or phrases of suitable age and respectability but must apply its own intelligence to the law and facts. It is to be expected that direct and specific precedents for each particular application of a statute are not available, and it would be a stultifying argument indeed to suggest that a court should reject an interpretation of the law because it had never been previously advanced or judicially considered.

In this aspect, if the court finds Latin phrases helpful, we respectfully suggest that the appropriate maxim for this cause is found in Coke's Littleton 283b, *Qui haeret in litera haeret in cortice,* Who clings to the words clings to the skin. Or, as expressed by Lord Mansfield in *Fisher v. Prince,* 3 Burr. 1363,

"The reason and spirit of cases make law, and not the letter of particular precedents."

CONCLUSION.

The conclusions set forth in our opening brief are valid and the points cited by appellees, that no law has a complete and uniform equality, and that a particular application of a law in each first instance is unsupported by direct precedent, do not affect our conclusions that the deputy commissioner properly interpreted Section 14(m) as a provision relating to the liability of the employer and not to the compensation of the totally disabled employee and properly applied the limitation to separate injuries in separate employments.

The complaint should be dismissed.

Dated, San Francisco, California,
March 20, 1950.

Respectfully submitted,

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